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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-359

FLR CORPORATION, *Appellant*

v.

BILL BLODGETT, ET AL, *Appellees*

Appeal From The Supreme Court Of The State Of Texas

ANSWER TO MOTION PURSUANT TO RULES 16(b) AND 16(d) TO DISMISS APPEAL OR AFFIRM JUDGMENT

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REPLY TO APPELLEE'S STATEMENT

Appellant believed that it had stated the case adequately in its Jurisdictional Statement, however, as Appellee has presented its own statement of the case, we find it necessary to reply thereto.

Your Appellee in its STATEMENT OF THE CASE has knowingly violated the time honored briefing rules of this Court by inserting extraneous material not contained

in the record of the Appeal in its effort to discourage this Court from reviewing this matter and defeating Appellant's good faith effort to correct what Appellant contends is an obvious wrong done to it. When, and if, this Court reviews the record, the liberties taken by Appellee will become obvious.

Appellee is obviously in error when it states that this case began other than before the Honorable Judge A. P. Allison of the 198th Judicial District Court of Bandera County, Texas. There was an earlier case filed in the District Court of Harris County, Texas, however that case was dismissed and non-suited without prejudice by Plaintiff, Appellant here, at approximately 9:25 a.m. on June 4, 1974, and became entirely moot from that moment forward. There were no orders or decisions of any kind or nature whatsoever by the Judge in that earlier case. The Judge therein did not agree or disagree with anything presented and before it acted or had an opportunity to act, Judge Allison had issued a temporary restraining order and that earlier case was dismissed. Under Texas law it was entirely possible for the Defendants, Appellees here, to have maintained jurisdiction before Judge Rayburn in Harris County by the filing of a request for affirmative relief. However, they chose not to do so, but instead confirmed the jurisdiction of Judge Allison in Bandera by requesting affirmative relief from Judge Allison. After 9:25 a.m. June 4, 1974, there was only one Court with jurisdiction of the parties and the subject matter and that Court was in Bandera, Texas.

Appellee is in error in its statement of the case wherein it says it "delivered a notice of the hearing to the office of Appellant's and *offered him a ride to Brady*". Appellee

admits that Appellant's counsel was returning to Houston at the time and was not available for any such offer.

Insofar as Appellee implies that Appellant refused to travel to Brady for any hearing before Judge Allison, such implication is in error. It constitutes no part of the record. The Chief Executive Officer for Appellant, Mr. Richard Olivere, was in Bandera, Texas, with a friend who was an attorney licensed to practice law in the State of California and not in the State of Texas. Mr. Lee was not acting and could not act as Mr. Olivere's attorney or as attorney for the FLR Corporation, and was not, and could not, be presumed to be acquainted with the technical aspects of the Texas Rules of Civil Procedure pertaining to Temporary Restraining Orders and injunctions.

With regard to Appellee's assertion that it gave Appellant "an option to repurchase the land sold by the Trustee" such is irrelevant and immaterial to this appeal, is not an issue in this case, and although it constitutes part of the record, such "option to repurchase the land" as will be seen by the record was an impossible and meaningless grant when finally submitted. However, that "option to repurchase" was a specific condition imposed by the Honorable Judge Allison as consideration for his dissolution of the restraining order. (Plaintiff Exhibit 30).

The filing of an Appeal Bond following the dissolution of the Temporary Restraining Order is entirely irrelevant to this appeal and constitutes no part of the record. This preliminary intent to appeal the order of dissolution was abandoned by Appellant. Appellant specifically and intelligently declined to move forward with that appeal and permitted it to be dismissed *without prejudice* in

accordance with Texas Law for the reason that Appellant did not feel that the matter had been fully developed and that it would not be fair to Appellant, Appellee, or the Appellate Court to prosecute such a preliminary and limited appeal. However, this matter is entirely irrelevant and immaterial to the matters before this Court and it constitutes no part of the record before the lower courts and is utterly meaningless to this appeal.

Also irrelevant and immaterial, constituting no part of the record, and utterly meaningless to this appeal, is the order of the Bankruptcy Judge on December 23, 1974, which order permitted the prosecution of the instant case before Judge Allison rather than in the Bankruptcy Court. The so-called "findings of fact and conclusion of law" of the Bankruptcy Judge did not pertain to any question before the Bankruptcy Judge and were therefore extraneous, irrelevant, immaterial, and not binding in any way upon either party to this case.

ANSWERS TO APPELLEE'S ARGUMENT

1. **The Federal questions sought to be reviewed were timely raised under the Texas Rules of Civil Procedure and under Texas Common Law.**
2. **The questions asserted by Appellant were passed upon by the Supreme Court of Texas as by its omission.**
3. **The opinion of the Court sought to be reviewed rests squarely on the Federal grounds sought to be reviewed before this Court and may not be supported on any substantial or adequate non-Federal basis.**
4. **A substantial Federal question is raised.**

Appellant will not answer Appellee's argument about the appeal of June 24, 1974, for the reason that it constitutes no part of the record. Even if it did, Rule 415 TRCP (see appendix A of Appellee's Motion) permits dismissal of such appeal and that appeal was dismissed by the Clerk of that Court as "moot" (Appellee's appendix B). Appellant did not pursue that interlocutory appeal for the reason that Appellant did not feel that it would be fair to Appellant, Appellee, or to the Appellate Court to prosecute because the facts of the case had not been properly developed at that time. Appellee could have asked the Appellate Court to hear the appeal anyway and dismiss it with prejudice, however Appellee did not do so and should not be heard to complain at this time. This is the very first time that Appellee has brought up this earlier abandoned appeal during the entire proceeding before the Texas Courts. Such an argument, therefore, is utterly meaningless and an imposition upon your Appellant and this Court.

Regarding the question of fundamental error, Texas law, administering to civilized and enlightened citizens, has always assumed that its citizens know and follow the law and the Courts themselves, at least with respect to fundamental law, has not felt that the basic tenets of the Constitution of the United States and the Amendments thereto have to be continuously pointed out.

Your Appellant is complaining that it was not afforded *due process of law* as required by the Constitution of the United States. Must Appellant use the words "due process of law" to complain that Judge A. P. Allison purported to dissolve the Temporary Restraining Order without a hearing as required by the Texas Rules of Civil Procedure? Must Appellant state the words "due process of law"

when it complains that Judge Allison received evidence in the telephonic hearing without the knowledge of Appellant? Must Appellant use those words when Appellant complains that Judge Allison ordered the Trustee to commence the foreclosure sale prior to the telephonic hearing and ordered the Trustee to sell the property following the telephonic hearing?

Each of the above questions were presented to the lower Court during trial and were submitted to the Court of Appeals of El Paso where the words *due process of law* were specifically used, and to the Supreme Court of the State of Texas, and were ruled upon adversely to Appellant by each of said Courts.

Appellee states that "the error set forth at page 5 of the Jurisdictional Statement" was improperly raised because it was raised for the first time in its reply brief filed in the Court of Civil Appeals contemporaneously with the opening words of Appellant's oral argument. Appellee says that "under Texas procedure, the Appellant's assertion of error in such a manner was not seasonably made". Appellee cites no authority for this astounding statement. The reply brief filed by Appellant, as Appellee says, was accepted by the Court of Civil Appeals and is a part of the record in this case. The points and arguments submitted therein were considered by the Texas Court of Civil Appeals. The Texas Court of Civil Appeals, however, chose not to write on the question presented. This Court knows there is considerable difference between the Appellate Court's refusing to "pass" on certain questions and refusing to "write" on those questions. If the questions are presented to the Appellate Court and it chooses not to write its opinion with respect to those questions, it nevertheless has passed upon them.

THE JUDGMENT MAY NOT BE SUSTAINED UNDER THE DUE PROCESS CLAUSE

The Texas Court of Civil Appeals in its opinion declared *the general common law rule in Texas is that the Court in which suit is first filed acquires dominant jurisdiction to the exclusion of other coordinate Courts and cites the case of Curtis v. Gibbs.* (Citation omitted). That case involves two courts, each with active cases before them involving the same parties and the same facts and each seeking to modify an earlier final judgment. In our situation, the earlier case in the 190th Judicial District Court of Harris County had been *dismissed* at the earliest opportunity and at the time of the order of dissolution of the Temporary Restraining Order by Judge Allison, there was *only one case* in existence anywhere.

The Texas Court of Civil Appeals was simply in error in its declaration of Texas law as applied to this case, and Appellee's argument is therefore not in point.

A SUBSTANTIAL FEDERAL QUESTION IS PRESENTED

Judge Allison ordered the commencement of the foreclosure sale *prior to any notice* to Appellant, and ordered the Trustee to complete the sale following the telephone conference.

A state official became involved in a foreclosure proceeding. There was, therefore, "significant state action".

It is *not* the contention of Appellant that the contractual foreclosure remedy utilized by Appellee is unconstitutional. It is the contention of Appellant that when

a state Court enjoins a Trustee and Mortgagee from proceeding with a foreclosure proceeding under that contractual foreclosure remedy, in order to set aside that enjoinment, there must be an adequate notice and hearing as expeditiously and as the ends of *justice* require. Rule 608 TRCP (emphasis added) Here there was no notice of the oral order to the Trustee to commence the sale prior to the telephone conference and there was inadequate notice and inadequate opportunity to be heard during the telephone conference. Evidence, unknown to Appellant, was received by the Court during the telephone conference.

Appellant complied with every state procedural requirement and the Court issuing the Temporary Restraining Order, Judge A.P. Allison, had complete jurisdiction.

For the sake of argument, if Appellee's contention that Judge Allison did not have jurisdiction at the time of the issuance of the Temporary Restraining Order, immediately upon the dismissal of the Harris County case, Judge Allison was the only Court with jurisdiction and his Court thereby acquired "dominant jurisdiction" and his orders were the only valid Court orders, at all times, before any Texas Court.

The Appellee should be considered to have *waived* any objection to the validity of Judge Allison's Temporary Restraining Order by demanding that the Temporary Restraining Order be dissolved. Certainly at that time Appellee did not consider the Temporary Restraining Order to be invalid, but instead sought the order of the Court to commence the sale prior to the hearing and sought the order of the Court dissolving the Temporary Restraining Order and relied upon that Order of dissolution in their foreclosure proceeding.

THE JUDGMENT SHOULD BE REVERSED

Your Appellant says that the judggment of the Texas Court of Civil Appeals and the Supreme Court of Texas is not only incorrect under Texas Law but violates the *due process clause* of the Constitution of the United States.

It must be remembered that Appellant's home office was in Harris County, Texas, 200 miles away from the situs of the land in Bandera County where the Trustee's sale had to take place under Texas Law. If the Harris County Court refused the Temporary Restraining Order that Tuesday morning of June 4, 1974, it would have been totally impossible for the officers and attorneys for FLR Corporation to travel to Bandera, Texas, to attend the foreclosure sale. Upon the Houston Court's postponing consideration of the Temporary Restraining Order until the morning of June 4th, Appellant's only safe procedure was to seek the Court with jurisdiction over the real property involved, the Honorable Judge A.P. Allison of the 198th Judicial District Court of Bandera County, Texas. Because the Court and Clerks in Harris County had closed their offices, a non-suit could not be presented to the Harris County Court until the next morning. Upon Judge Allison's issuance of the Temporary Restraining Order, that case was dismissed at Appellant's earliest opportunity. Appellant did not "forum shop" but instead followed Texas procedure as prescribed by the Texas Rules of Procedure to the letter.

CONCLUSION

This is a case illustrative of the forces of power acting upon the human elements administering Texas procedure.

The Appellee is represented by the largest and most powerful law firm in the United States and is backed by a huge financial institution. Your Appellant is represented by a sole practitioner and this case is its sole asset from which it can make any recovery for the benefit of its many creditors in the Bankruptcy Court and its investors and which can return the property, The Flying L Ranch, to the gorgeous resort community as it was originally intended.

Appellant respectfully urges that this Appeal should be allowed and that upon hearing and full consideration that this Court reverse the judgment of the Supreme Court of Texas.

Respectfully submitted,

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